IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CSX TRANSPORTATION, INC., Plaintiff, vs. ANTHONY A. WILLIAMS and DISTRICT OF COLUMBIA, Defendants.	CASE No. 1:05CV00338 (EGS) **MOTION TO INTERVENE OF SIERRA CLUB**

MEMORANDUM OF LAW IN SUPPORT OF SIERRA CLUB'S
MOTION TO INTERVENE AS A DEFENDANT

I. INTRODUCTION

This memorandum supports the Motion of the Sierra Club to intervene as a matter of right as a defendant in this action, in which plaintiff seeks declaratory and injunctive relief to prevent the District of Columbia from implementing and enforcing its Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005 ("Terrorism Prevention Act"). In the alternative, Sierra Club moves for permissive intervention pursuant to Federal Rule of Procedure 24(b). Counsel for the District of Columbia ("District") has stated that the District consents to the Sierra Club's intervention.

II. FACTUAL BACKGROUND

Following the tragic attacks of September 11, 2001, the D.C. Council began a process of identifying and addressing the uniquely grave terrorist threats that face the District. Working closely with the Sierra Club, community organizations, and concerned citizens, the Council focused particularly on the security of certain hazardous materials shipments that travel mere blocks from the U.S. Capitol. The FBI had warned in 2002 that terrorists were specifically interested in "targeting hazardous material containers" in attacks on U.S. soil. The Department of Transportation (DOT) found that "hazardous materials transported in commerce potentially may be used as weapons of mass destruction or weapons of convenience." Department of Transportation, Research and Special Programs Administration, Notice of Proposed Rule Making, Hazardous Materials: Security Requirements for Offerors and Transporters of Hazardous Materials, 67 Fed. Reg. 22028 (May 2, 2002) ("HM-232 NPRM"). In 2003 the Center for Strategic and International Studies similarly pointed out that, with respect to "rail transport of large quantities of highly toxic chemicals," "[t]error groups cannot help but have noted this extremely weak spot in the system." Center for Strategic and International Studies, Silent Vector: Issues of Concern and Policy Recommendations, September 2003, at 15.

In studying the need for legislation to respond to this threat, the D.C. Council held two hearings during which it heard testimony from security experts, community groups, industry officials, representatives from federal agencies, and the Sierra Club. Based on this evidence, the Council found that:

1. A terrorist attack on a large quantity hazardous materials shipment within the Capitol Exclusion Zone would be expected to cause tens of thousands of deaths and catastrophic economic impacts of $5 billion or more.

2. The terrorism threat facing D.C. residents and workers in the vicinity of the Capitol Exclusion Zone requires a response that recognizes and addresses the unique status of

this area in American political life and history, and the terrorism risk that results from this status.

3. The federal government has not acted to prevent the terrorist threat resulting from the transportation of dangerous volumes of ultrahazardous materials through the Capitol Exclusion Zone.

4. Ultrahazardous materials shippers do not need to route large quantities of ultrahazardous chemicals through the Capitol Exclusion Zone in order to ship such chemicals to their destinations, and alternative routes would substantially decrease the aggregate risk posed by terrorist attacks.

5. Excluding ultrahazardous shipments from the Capitol Exclusion Zone (in circumstances where there is a practical alternative) would impose no significant burden on interstate commerce.

The Council passed the Terrorism Prevention Act on the basis of these findings. The Act renders it illegal to transport certain ultrahazardous materials, in certain threshold quantities, within the Capitol Exclusion Zone, defined as all areas within the District of Columbia that lie within 2.2 miles of the Capitol Building, without a permit.[1] Permits may be issued only upon demonstration that there is "no practical alternative route," meaning no route outside the Exclusion Zone the use of which would not be cost-prohibitive. Issuance of a permit may be

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[1] There are four categories of covered materials:

(1) Explosives belonging to Class 1, Divisions 1.1 or 1.2 as defined in 49 C.F.R. §§ 173.2—i.e., explosives with a mass explosion hazard or a projection hazard—in quantities greater than 500 kg;

(2) Flammable gasses as defined in 49 C.F.R. §§ 173.2, 173.115, in quantities greater than 10,000 liters;

(3) Poisonous gasses belonging to Hazard Zones A or B as defined in 49 C.F.R. §§ 173.2, 173.116—i.e., gasses that are lethal to 50% of the population, under average conditions, at concentrations less than or equal to 1000 ppm—in quantities greater than 500 liters;

(4) Poisonous materials, other than gasses, of Class 6, Division 6.1 as defined in 49 §§ C.F.R. 173.2, 173.132, belonging to Hazard Zones A or B as defined in 49 C.F.R. § 173.133.

made contingent on the adoption of safety measures, including, but not limited to, time-of-day restrictions.

The Act passed by a 10-1 vote on February 1, 2005. Mayor Anthony Williams signed the Act into law on February 15, 2005. On Feburary 16, 2005, CSX filed the instant lawsuit, naming Mayor Williams and the District of Columbia as defendants and seeking injunctive and declaratory relief to prevent the Terrorism Prevention Act from taking effect. Defendants have not yet filed a response to CSX's complaint.

III. THE NATURE OF MOVANT'S INTEREST IN THIS CASE

The Sierra Club is a nationwide organization whose mission is to protect communities from threats to their environment. As such, the Sierra Club has a strong interest in addressing the grave threat posed by the transportation of ultrahazardous materials through areas that are both densely populated and likely to be attractive targets for terrorist attack. The Sierra Club has been closely involved in the D.C. Council's process of crafting a response to this threat, and has strongly supported the Terrorism Prevention Act from its inception. It seeks to intervene in this action to defend the Act as valid legislation under the Commerce Clause, the Federal Rail Safety Act, the Hazardous Materials Transportation Act, the Interstate Commerce Commission Termination Act, and the Home Rule Act.

The Sierra Club has approximately 3,000 members who live in the District and approximately 15,000 more in nearby areas, a substantial number of whom live, work, and regularly travel through the Capitol Exclusion Zone. The risk of a terrorist attack on ultrahazarous materials shipments in their communities has diminished, and will continue to diminish, their quality of life; and threatens the physical, ecological, economic, and social values

that are precious to the area and to these individual Sierra Club members. Their use and enjoyment of their land for cultural, recreational, aesthetic, business, and/or environmental purposes will be directly and adversely affected if the Terrorism Prevention Act is not implemented and enforced. In addition, the Sierra Club has thousands of members who live in jurisdictions that may be affected by the Terrorism Prevention Act, including approximately 110 members who live within 15 miles of the western Virginia rail route that provides the most likely and practical alternative to rail transportation through the Capitol Exclusion Zone.

IV. MOVANTS ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT

Rule 24(a)(2) of the Federal Rules of Civil Procedure governs motions for intervention as of right. That rule provides:

> Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Under the rule as it has been interpreted in this Circuit, an applicant must be granted leave to intervene if (1) the motion to intervene is timely; (2) the movant has an interest in the action; (3) the action potentially impairs that interest; and (4) the movant is not adequately represented by existing parties to the action. *See, e.g.*, *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003); *Am. Horse Ass'n v. Veneman*, 200 F.R.D. 153, 156 (D.D.C. 2001). In addition, a movant seeking leave to intervene under Rule 24(a)(2) must have standing under Article III of the Constitution. *See, e.g.*, *Bldg. & Constr. Trades Dep't v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994).

The Sierra Club satisfies each of these requirements. It has a concrete interest in this case sufficient to satisfy both Article III and Rule 24(a)(2); that interest may be impaired by the action; it is clear that the District of Columbia cannot adequately represent the Sierra Club's interests as a national membership organization focused on environmental issues; and the Sierra Club's application for intervention is indisputably timely. The Sierra Club is therefore entitled to intervene as of right under Rule 24(a)(2).

A. The Sierra Club Has a Cognizable Interest in the Subject of the Action

As the factual overview makes clear, the Sierra Club possesses precisely the kind of interest in upholding the Terrorism Prevention Act that has been found sufficient to establish both its standing to sue and its right of intervention.

To establish Article III standing, a party seeking to intervene to uphold government action must demonstrate (1) that it will be injured in fact by the setting aside of the government's action; (2) that this injury will have been caused by that invalidation; and (3) that the injury would be prevented if the government action is upheld. *Am. Horse Protection Ass'n*, 200 F.R.D. at 156. The Sierra Club satisfies these requirements. Thousands of Sierra Club members live and work in the District, where the unrestricted flow of large quantities of ultrahazardous materials just a few blocks from the most prominent terrorist target in the United States subjects them to the constant threat of injury and death. The Terrorism Prevention Act drastically reduces that threat. Its invalidation would place the Sierra Club and its members in reasonable fear of serious bodily injury; radically diminish their quality of life and their enjoyment of land for cultural, cultural, recreational, business, and/or environmental purposes. Such interests are sufficient to confer standing to sue. *See, e.g.*, *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972)

(aesthetic and environmental interests are sufficient to confer standing); *Covington v. Jefferson County*, 358 F.3d 626, 641 (9th Cir. 2004) (credible threat that landfill contamination will cause damage to neighboring property confers standing); *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1234-35 (D.C. Cir. 1996) (increased risk of wildfire from certain logging practices constitutes injury in fact for standing purposes). They are similarly sufficient to establish the Sierra Club's right to intervene. *See Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1076 (D.C. Cir. 1998) (a would-be intervenor "need not show anything more than that it has standing to sue in order to demonstrate the existence of a legally protected interest for purposes of Rule 24(a)"); *accord Fund for Animals*, 332 F.3d at 735.

B. Absent Intervention, Movant's Interest Would Be Greatly Impaired

In determining whether a movant's interests will be impaired by an action, courts in this circuit look to the "practical consequences" to the movant of denying intervention. *See Nuesse v. Camp*, 385 F.2d 694, 701 (D.C. Cir. 1967); *accord Natural Res. Defense Council v. Costle*, 561 F.2d 904, 909 (D.C. Cir. 1977). As the Advisory Committee Notes to the 1966 amendments to Rule 24(a) explain, "[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene."

The interests of the Sierra Club and its members would be greatly impaired if it were denied leave to intervene in this case. An unfavorable ruling would undo the Sierra Club's work to achieve a legislative solution to the terrorist threat posed by hazardous materials shipments near the U.S. Capitol, and would leave the Sierra Club and its members once again vulnerable to that threat. And absent intervention, there is little that the Sierra Club could do to challenge such a ruling, short of filing its own lawsuit. Because the very purpose of Rule 24's "interest" test is

to be "'a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process,'" it is well-established that intervention should not be denied merely because "applicants may vindicate their interests in some later, albeit more burdensome, litigation." *Costle*, 561 F.2d at 910 (quoting *Nuesse*, 385 F.2d at 701).

C. The Existing Parties Do Not Adequately Represent Movant's Interests

Under Rule 24(a)(2), a movant who satisfies the impairment of interests test "shall be permitted to intervene" unless "the applicant's interest is adequately represented by existing parties." The Supreme Court has described the burden of making this showing as "minimal," and has held that the requirement is satisfied if the applicant shows that representation "may be" inadequate. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972). Courts in this Circuit have held that this "minimal" burden may be harder to sustain when the movant seeks to intervene on behalf of a government entity, which "is presumed to represent the interests of all its citizens." *Environmental Defense Fund, Inc. v. Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979). But as courts have also recognized, it is often precisely because the government must represent the general interests of all its citizens that it is incapable of adequately representing the interests of certain aspiring intervenors. *See, e.g.*, *Dimond v. District of Columbia*, 792 F.2d 179, (D.C. Cir. 1986) (referring to the "relatively large class of cases in this circuit recognizing the inadequacy of governmental representation of the interests of private parties in certain circumstances," and allowing private party to intervene to defend the constitutionality of a District of Columbia statute); *Fund for Animals*, 322 F.3d at 736-37 & n.9 (holding that the federal government did not adequately represent the interests of a foreign government ministry); *Smuck v. Hobson*, 408 F.2d 175, 181 (D.C. Cir. 1969) (holding that parents of school children were entitled to intervene on behalf of school board because, while the school board "represents

all parents within the District," the would-be intervenors "may have more parochial interests centering upon the education of their own children"). As the D.C. Circuit explained in *Dimond*, "[a] government entity such as the District of Columbia is charged by law with representing the public interest of its citizens. . . . The District would be shirking its duty were it to advance [a] narrower interest at the expense of its representation of the general public interest." 792 F.2d at 192-93.

The Sierra Club's interest in this litigation is at once narrower and broader than that of the District of Columbia. It is narrower in the sense that the Sierra Club represents only a subset of citizens concerned with the environmental and public safety consequences of hazardous materials shipments near the U.S. Capitol, and does not, like the District of Columbia, have an obligation to consider any countervailing financial and economic interests that other District residents may have. *See In re Sierra Club*, 945 F.2d 776, 780 (4th Cir. 1991). It is, however, broader in the sense that the Sierra Club is a national membership organization that represents individuals nationwide, including residents of jurisdictions that may be affected by the Terrorism Prevention Act. The District government, on the other hand, is charged only with representing the public interest of District residents. The Sierra Club's broader mandate is of particular importance in this litigation, since one of CSX's central claims is that the Terrorism Prevention Act "simply shift[s] the inherent risk of hazardous materials transportation to other jurisdictions." CSX Complaint ¶ 55. Although the Sierra Club shares with the District an interest in defending the Terrorism Prevention Act against this and other claims, it is significant that the Sierra Club's position in this matter is informed by its duty to advance the interests of D.C. citizens and non-D.C. citizens alike.

D. The Motion to Intervene Is Timely

There can be no serious dispute that the Sierra Club's motion to intervene is timely. CSX filed its complaint on February 16, 2005, and the District of Columbia has not yet answered the complaint.

V. MOVANTS SHOULD BE ALLOWED PERMISSIVE INTERVENTION

If this Court determines that intervention of right is not appropriate, the Sierra Club requests in the alternative that the Court grant permissive intervention under Fed. R. Civ. P. 24(b)(2). That rule provides in pertinent part:

> Upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the parties.

Interpreting this rule, courts in this Circuit have ruled that permissive intervention is appropriate when there is: (1) an independent basis for subject matter jurisdiction, (2) a timely motion, and (3) a claim or defense that shares a common question of law or fact with the action in which intervention is sought. *See EEOC v. Nat'l Children's Ctr.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). "These requirements for permissive intervention are to be construed liberally, 'with all doubts resolved in favor of permitting intervention.'" *In re Vitamins Antitrust Litig.*, No. 99-197, 2001 WL 34088808, at *3 (D.D.C. Mar. 19, 2001) (quoting Fed. R. Civ. P. 24).

As discussed above, the Sierra Club's application is timely. Given the early date, the Sierra Club's participation will cause no prejudice or undue delay to the existing parties. And the Sierra Club's positions in defense of the Terrorism Prevention Act will complement, rather than conflict with, the District's defenses in this litigation. The Sierra Club submits that its

familiarity with hazardous materials regulation, its unique perspective as a national environmental organization, and its understanding of the legal issues will enable it to contribute substantially to the Court's consideration of this matter.

VI. CONCLUSION

For the foregoing reasons, this Court should grant the Sierra Club intervention of right under Fed. R. Civ. P. 24(a)(2), or, in the alternative, permissive intervention under Fed. R. Civ. P. 24(b).

Respectfully submitted,

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Dated: February 28, 2005

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of February, 2005, the foregoing Memorandum of Law in Support of Sierra Club's Motion to Intervene as a Defendant was served through the electronic case filing system on the following:

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